Supreme Court, U.S.
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No. 05-

In the

Supreme Court of the United States

NANCY LOUISE ABERNATHY,
Petitioner

v.

PEOPLE OF THE STATE OF MICHIGAN
Respondent

On Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT THE WRIT TO HARMONIZE THE INCONSISTENT STANDARDS USED BY THE VARIOUS CIRCUIT COURTS WHEN DECIDING WHETHER A PETITIONER RAISING INEFFECTIVE LAWYERING IN A COLLATERAL PROCEEDING SHOULD BE GIVEN A HEARING SO THAT A RECORD CAN BE DEVELOPED?

II. WHETHER THIS COURT SHOULD GRANT THE WRIT TO CLARIFY THE INTERPLAY BETWEEN THE DOCTRINE OF INCONSISTENT DEFENSES AND INEFFECTIVE LAWYERING WHEN INCONSISTENT DEFENSES ARE PRESENTED TO THE PREJUDICE OF THE CRIMINAL DEFENDANT?

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Nancy Louise Abernathy respectfully petitions this Court for a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in this cause on November 24, 2004 and January 24, 2005.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Western District of Michigan were not published. They are reprinted in the Appendix hereto ("App.") at 1a-10a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgments in this case on November 24, 2004, and January 24, 2005. The jurisdiction of the Sixth Circuit Court of Appeals was based on 28 U.S.C. 1291 and 28 U.S.C. 2253. The district court had jurisdiction pursuant to 28 U.S.C. 2241 and 2254. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth, and Fourteenth Amendments are involved are included in the Appendix at App. 11a-13a.

INTRODUCTION

This case presents questions similar to the issues addressed by this Court in *Massaro v. United States*, 538 U.S. 500 (2003) and *Mathews v. United States*, 485 U.S. 58 (1988).

In *Massaro*, this Court, in the context of a federal habeas petition, ruled that a criminal defendant did not have to raise ineffective lawyering in a direct appeal in order to preserve that issue for collateral proceedings. In reaching that decision, this Court reasoned that the record is usually insufficiently developed, making it impossible for a reviewing court to make principled decisions about the criminal defendant's claims.

The Circuit Courts are in general agreement that ineffective lawyering claims should be raised in collateral proceedings. The Circuit Courts also generally agree that there are some ineffective lawyering claims which can be considered on direct appeal because the record has been sufficiently developed.

However, the Circuit Courts are not in agreement about the standards that should be used to decide whether the record is sufficient for a reviewing court to make a decision on the merits without further proceedings. For example, the Fourth Circuit has couched its analysis in terms of a record which conclusively demonstrates that ineffective lawyering did nor did not occur. *E.g., United States v. King*, 119 F.3d 290 (4th Cir. 1997). The Third Circuit has held that, after *Massaro*, a hearing should be held to develop a record about prejudice even when the government has essentially conceded that trial counsel was ineffective. *United States v. Thornton*, 327 F.3d 268 (6th Cir. 2003).

In *Massaro* itself, this Court opined that there may well be some cases where the record is clear and where appellate counsel might be well advised to raise the ineffective lawyering claim on direct appeal. However, this Court left the implementation of such matters to another day, leaving open the question which the Petitioner is raising in her Petition.

In the instant case, the record was clear that the Petitioner had raised ineffective lawyering in all of the state and federal courts in which she had appeared. Her efforts began in the trial court when she filed a Motion for a New Trial and continued through the Sixth Circuit Court of Appeals. In each Court, the Petitioner asked for a hearing so that a record could be developed about ineffective lawyering.

Each Court refused a hearing and concluded that the trial attorney was not constitutionally ineffective based on the existing record. It is the Petitioner's position that each Court assumed that there was a constitutionally-acceptable tactical reason for the attorney's conduct and used that assumption to deny relief. It is the Petitioner's further position such assumptions are contrary to this

Court's reasoning in *Massaro*, and to the constitutional guarantee of a fair proceeding embodied in the Fifth and Fourteenth Amendments.

The Appellant respectfully asks this Court to conclude that these contrary positions plus the different viewpoints held by the various Circuit Courts provide this Court a reason to clarify the issue left open in *Massaro*.

An additional reason to grant certiorari is to address the issue of the applicability of *Massaro* to state habeas petitioners who have not procedurally defaulted their claims[1]. *Massaro* did not address that issue because the defendant in that case was a federal defendant who was seeking habeas relief pursuant to 28 U.S.C. 2255.

For these reasons, the Petitioner is respectfully asking this Court to grant certiorari and to address the question of the standards that should be used by the Circuit and District Courts who must decide whether to grant an evidentiary hearing in the cases of state or federal defendants who follow this Court's admonition, who seek collateral review and who are seeking a hearing to develop a record about ineffective lawyering.

The Petitioner is also asking this Court to grant certiorari for a different reason.

Specifically in *Mathews*, the criminal defendant sought to interpose an entrapment defense and to also argue that he did not commit a crime should the jury reject the entrapment defense. The lower courts had not allowed the defendant to present these dual defenses. This Court disagreed, reversed the defendant's conviction

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[1]Some of the Circuit Courts have concluded that *Massaro* only applies to federal habeas petitions. As a result, those Courts have couched their analysis in terms of the adequate and independent state ground doctrine in cases where the state criminal defendant has procedurally defaulted under state law. *E.g., Sweet v. Bennett*, 353 F.3d 135 (2d Cir. 2003); *Gomez v. Jaimet*, 350 F.3d 673 (7th Cir. 2003). This line of cases has not addressed the applicability of *Massaro* to a state habeas petitioner who, like the Petitioner in the instant case, has not defaulted.

and remanded for further proceedings.

The instant case presents a similar issue, but in a somewhat different context.

Specifically, the issue is whether the presentation of inconsistent defenses can ever be ineffective lawyering. If so, the task is to identifiy the factors which transform a potentially acceptable tactical decision into a violation of a criminal defendant's constitutional rights.

In the instant case, the trial attorney chose to present dual defenses. One defense was an innocence defense. The other defense was an insanity defense.

There are several factors which distinguish the Petitioner's case from a different type of case where such dual defenses might be appropriate. Specifically, the Petitioner testified and flatly denied that she had killed her daughter-in-law. The Petitioner's credibility was thus central to the innocence defense. However, the presentation of an insanity defense undermined the Petitioner's credibility because, to accept the insanity defense, the jury had to conclude that the Petitioner was lying.

The insanity defense was presented through an expert witness whose testimony did not establish legal insanity as Michigan defines that term. The insanity-related testimony was premised on the assumption that the Petitioner was guilty of the killing. Among other things, the insanity-related testimony allowed the People to introduce inculpatory statements allegedly made by the Petitioner which would have been otherwise inadmissible.

There were other problems with the dual defense which are discussed *infra*.

It has been the Petitioner's position that the presentation of an inconsistent defense which has no legal foundation and which prejudiced the Petitioner by undermining her credibility does not fall within the ambit of this Court's reasoning in *Matthews* or with the

other Circuit opinions that have discussed and approved the general concept of inconsistent defenses.

The Petitioner is respectfully asking this Court to grant certiorari to address the interplay between inconsistent defenses and ineffective lawyering.

STATEMENT OF THE CASE

The Petitioner's daughter-in-law was found in the Petitioner's home during the early morning hours of May 13, 1995. She had been fatally shot. The Petitioner and her daughter had been in the home at the time that the daughter-in-law was shot. The Petitioner was ultimately charged with First-Degree Murder and Felony Firearm.

The Petitioner had made potentially inculpatory statements to a number of individuals. Specifically, the Petitioner had allegedly told a friend that she intensely disliked her daughter-in-law and that killing her daughter-in-law would be a way to solve the Petitioner's problem. The Petitioner had allegedly told another friend, some three weeks before the killing, that she could solve her daughter-in-law problem by killing her and by then claiming insanity. During an interview shortly after the killing, the Petitioner had asked a police officer about what would happen to her if she admitted to the killing. The Petitioner had allegedly spoken with two female prisoners while she was being transported to a forensic examination. These prisoners claimed that the Petitioner had admitted to killing her daughter-in-law. While the Petitioner was being examined at the forensic center, she allegedly told clinicians that she had killed her daughter-in-law.

The Petitioner's trial attorney filed a Suppression Motion, and testimony was taken over a six day period between January 6, 1997 and January 21, 1997. The trial judge denied the suppression motion on January 22, 1997. Because the State had essentially presented its entire case at the suppression hearings, the trial attorney had a blueprint for the trial.

Prior to trial, the trial attorney had notified the Court of his intent to present both an insanity defense and an innocence defense. This decision greatly surprised the experienced trial judge who warned the trial attorney in the strongest of terms that he was making a mistake and that he should proceed on whatever theory the attorney thought strongest as opposed to the dual defense the attorney was proposing.

During trial, the jury learned that the police had not recovered the murder weapon. There were no witnesses to the shooting. The Petitioner had no prior record. Paraffin tests were negative. Others, including the Petitioner's husband, had access to the house. There was evidence of the Petitioner's use of many different medications. The Petitioner did have a prior history of blackouts.

The Petitioner testified and denied that she had committed the killing. The Petitioner testified that she had blacked out while investigating a noise and that her daughter-in-law was dead when she regained consciousness.

A mental professional testified about the blackouts. The explicit premise of the professional's testimony was the assumption that the Petitioner had committed the killing.

Because of the dual defense, the State was allowed to present evidence about what the Petitioner had told the various employees of the Forensic Center. Had the insanity defense not been presented, this testimony would have been inadmissible under Michigan law.

The Petitioner was convicted and sentenced to life in prison. The Petitioner exhausted her direct appeal process in the State system. The Petitioner sought habeas relief, but the district court denied her Petition. The Sixth Circuit Court of Appeals affirmed.

In every Court, including the trial court by way of a post-conviction motion for a new trial, the Petitioner has sought a hearing on her claim of ineffective lawyering. It has been the Petitioner's

position that her trial attorney had chosen both defenses on jury nullification grounds. The Petitioner argued that a hearing was necessary to establish both that her trial attorney's performance was constitutionally deficient and that she had been prejudiced by that substandard performance.

No Court has granted a hearing, and the Petitioner has never been able to develop a record about her claim of ineffective lawyering. It is the Petitioner's position that her constitutional rights to Due Process have been violated because she has presented a credible claim of constitutionally ineffective lawyering, because she has obeyed every procedural rule, and because she has been denied the opportunity to develop a record that would allow her to carry her burden of proof about ineffective lawyering.

REASONS FOR GRANTING THE WRIT

I. The Circuits have not defined and are thus in disagreement over when a hearing should be granted in a collateral proceeding to develop a record about claims of ineffective lawyering. This Court addressed a component of this issue in *Massaro v. United States*, 538 U.S. 500 (2003) and concluded that collateral proceedings are the most appropriate forum in which to raise ineffective lawyering claims. This Court should grant the writ to harmonize the reasoning used by the various Circuit Courts when deciding whether the collateral petitioner should be allowed to develop a record.

In *Massaro v. United States*, 538 U.S. 500 (2003), the defendant was convicted of murder in aid of racketeering. On the day before trial, the prosecutor learned that a bullet had been discovered in the vehicle where the victim's body was found. The prosecutor did not disclose this discovery until trial was underway. The trial judge offered to grant a continuance so that the defense could examine the bullet. Trial counsel declined that offer and the defendant was eventually convicted.

On appeal, a new attorney argued that the district court erred by admitting the bullet into evidence. The appellate attorney, however, did not claim that trial counsel had been ineffective for not accepting the continuance offered by the trial judge.

After the conviction was affirmed, the defendant filed a habeas petition, pursuant to 28 U.S.C. 2255. The defendant argued that his trial lawyer had been constitutionally ineffective for not accepting the continuance.

The Second Circuit had taken the position that when an appeal is handled by a new attorney, a criminal defendant procedurally defaults if the ineffective lawyering issue is not raised during the direct appeal.

This Court reversed and held that ineffective lawyering claims can be raised in collateral proceedings brought pursuant to 28 U.S.C. 2255 and that it was not necessary to raise those arguments on direct appeal in order to avoid procedural default.

In reaching this decision, this Court reasoned that the record is usually not sufficient to permit principled review at the time of the direct appeal. This Court noted that *Strickland v. Washington*, 466 U.S. 668 (1984) puts the burden on the defendant to show both prejudice and lawyering which was not supported by reasonable strategy.

At trial, the focus is on guilt or innocence. Thus, the parties are not trying to develop a record which will explain affirmative choices or omissions by the trial attorney. Even if the reasons for the trial attorney's conduct are discernible from the record, a reviewing court has no way of knowing whether the record is complete. Moreover, the defendant's prejudice may not be apparent from the cold record of a proceeding which had a completely different focus and purpose.

For these reasons, this Court concluded that it was the district court which was in the best position to develop an appropriate record. Among other things, the district court can take testimony

from the attorney who allegedly was ineffective and from other witnesses who could shed light on both ineffectiveness and prejudice. The government would also have an opportunity to present contrary witnesses.

This Court concluded that it would be the rare case that would be appropriate for direct appeal.

However, this Court also opined that there may be some cases where the record was sufficiently developed such that the ineffective lawyering argument could be addressed on direct appeal. This Court left for another day the issue of how the choice between collateral review and review on direct appeal should be made.

The Courts of Appeal appear to be in general agreement, as least in principle, that issues of ineffective lawyering should be raised during collateral proceedings. *E.g., United States v. Mala*, 7 F.3d 1058 (1st Cir. 1993); *United States v. Haywood*, 155 F.3d 674 (3d Cir. 1998); *United States v. King*, 119 F.3d 290 (4th Cir. 1997); *United States v. Brewster*, 137 F.3d 853 (5th Cir. 1998); *United States v. Naji*, 947 F.2d 211 (6th Cir. 1991); *United States v. Garrett*, 90 F.3d 210 (7th Cir. 1996); *United States v. Vgeri*, 51 F.3d 876 (9th Cir. 1995).

The Courts of Appeal also acknowledge in principle that there are circumstances where direct review is appropriate. However, the Courts of Appeal have not developed anything close to a uniform standard or analysis as to how and when the distinction is to be made between cases that should be resolved by collateral review and cases that should be resolved on direct appeal based upon the existing record.

For example, in *United States v. Thornton*, 327 F.3d 268 (3d Cir. 2003), a post-*Massaro* case, the defendant sought review of his ineffective assistance claim during the direct appeal. The defendant argued that his attorney had been ineffective for not requesting the redaction of a police report which painted him in unfavorable

terms. The district judge had redacted the report during the defendant's first trial on the grounds of unfair prejudice. The jury heard the evidence in the second trial because the trial attorney made no effort to seek a redaction.

On appeal, the government conceded that the attorney had been ineffective. The Third Circuit concluded, however, that because of *Massaro*, it was not appropriate for the appellate court to decide the prejudice issue in the first instance Rather, the record should be developed by the district court. The Third Circuit was persuaded by this Court's reasoning in *Massaro*:

> Even meritorious claims would fail on direct appeal if the trial record were inadequate to support them. Appellate courts would waste time and resources attempting to address some claims that were meritless and other claims that, though colorable, would be handled more efficiently if addressed in the first instance by the district court on collateral review.

327 F.3d at 272.

Because of this reasoning, the Court refused to consider the ineffective lawyering on direct appeal and directed the defendant to raise the issue as part of a collateral proceeding pursuant to 28 U.S.C. 2255.

In *United States v. King*, 119 F.3d 290 (4th Cir. 1997), a pre-*Massaro* case, the defendants were convicted of various drug and weapons offenses. On direct appeal, one of the defendants argued that his attorney was ineffective for failing to move to dismiss the indictment on speedy trial act grounds and for failing to file timely objections to the pre-sentence investigation report. The Fourth Circuit refused to consider the claim on the grounds that ineffective lawyering claims can only be considered in a direct appeal if "the record conclusively shows ineffective assistance". 119 F.3d at 295.

In *United States v. Santana*, 150 F.3d 860 (8th Cir. 1998), the defendant was convicted of drug-related offenses. On direct appeal,

the defendant argued that his defense attorney had been constitutionally ineffective. The Eighth Circuit refused to consider the argument. The Court stated that it would consider direct review only in an exceptional case where the record was developed or where the result would otherwise be a plain miscarriage of justice. The Court concluded, without elaboration, that neither standard was met by the defendant's argument.

In *United States v. Miskinis*, 966 F.2d 1263 (9th Cir. 1992), the defendant was convicted of engaging in a continuing criminal enterprise. On direct appeal, the defendant argued that he had received ineffective assistance of counsel because his attorney had a conflict of interest. Specifically, a former employee of the defendant's had testified at the grand jury that the defendant had told him that he had consulted with an attorney named Mitchell who had advised him that he was acting legally. After the defendant was indicted, he retained Mitchell as his defense lawyer. When the former employee's grand jury testimony was provided to Mitchell, Mitchell denied that he had ever advised the defendant.

The government sought to introduce evidence about these events. The district court ruled that no reference could be made to Mitchell or to a "prominent defense attorney".

The Ninth Circuit concluded that there was a serious question about whether there was a conflict. However, the Ninth Circuit also concluded that the record was insufficient to allow the Court to determine whether a conflict of interest actually existed. Specifically, the record did not show whether the defendant's defense was affected by the alleged conflict. That question could only be resolved by the defendant's testimony about issues such as whether his decision not to testify was affected by the alleged conflict.

As to standards, the Ninth Circuit spoke in terms of a discretionary decision which depends on the contents of the original record.

The contrasting situation was illustrated by *United States v. Brooks*, 125 F.3d 484 (7th Cir. 1997). In *Brooks*, the defendants

were convicted of bank robbery. One of the defendants argued that his trial counsel was constitutionally ineffective because he failed to attack a key prosecution witness for having made prior inconsistent statements and because he failed to object to an improper jury instruction.

The Seventh Circuit explained that it usually didn't consider ineffective lawyering claims on direct appeal on the grounds of inadequate factual record and because any adverse decision on direct appeal would foreclose collateral review. If the record was adequately developed, the Seventh Circuit would consider the issue on direct appeal, subject to the admonition that if the claim is rejected, "the appellant must live with the consequences". 125 F.3d at 496.

Because the Court concluded that the record was sufficiently developed and that the claims were clear-cut, the Court addressed the ineffective lawyering claim on direct appeal.

In *United States v. Carter*, 130 F.3d 1432 (10th Cir. 1997), the defendant had been convicted of drug-related offenses. On direct appeal, the defendant argued that his counsel had been ineffective when advising the defendant about whether to accept the government's plea offer prior to the first trial.

The Tenth Circuit stated that its general rule was to require ineffective lawyering claims to be brought in collateral proceedings. Among other things, the Court reasoned that the attorney accused of defective performance can explain his or her actions and the district court can rule based on a complete record.

In *Carter*, however, the defendant had made a post-trial motion which sought to compel the government to renew the prior plea proposal. The district court held a hearing, and both the defendant and his lawyer testified about their discussions about the plea offer. After hearing the testimony, the district court concluded that the lawyer had not been ineffective and that the defendant was stuck with his decision to roll the dice.

Because the record was complete, the Tenth Circuit reviewed the ineffective lawyering claim during the direct appeal.

In *United States v. Wunder*, 919 F.2d 34 (6th Cir. 1990), the defendant was convicted of wilfully failing to file income tax returns. On appeal, the defendant, a tax protestor, argued that his counsel was ineffective for not requesting a fifth amendment instruction, and for not objecting to the introduction of evidence about the tax owing and due.

The Sixth Circuit noted that ineffective assistance of counsel claims can rarely be considered on direct appeal because of a lack of a record. However, the Court also stated that if the record is adequate to consider the merits of the allegations, direct review might be appropriate.

In *Wunder*, the Court concluded that the record was sufficiently developed because there were enough facts to allow the Court to conclude that the defendant's claims were harmless as a matter of law.

In sum, it is the Petitioner's petition that the Courts of Appeals have not established any meaningful standards to be used to decide when the record is complete as is and/or when further factual development is required.

The harm caused by such lack of standards is illustrated by the Petitioner's own case.

The Petitioner's ineffective lawyering claim was based on the argument that, based on the specific facts of her case, the trial attorney's choice of dual defenses both prejudiced her and fell below the standards expected of a competent trial counsel. It was the Petitioner's position that the trial attorney's decision was not a tactical or strategic decision. Rather, the Petitioner argued that the decision was based upon a hoped-for jury nullification.

However, jury nullification is not an acceptable strategy, and, as set forth in more detail *infra*, the attorney's choice to espouse two

incompatible and unreconcilable theories caused prejudice that could have been avoided if the attorney had chosen one strategy or the other. *See, e.g., Sparf & Hanson v. United States*, 156 U.S. 51 (1895) (holding that deliberate efforts to persuade a jury to reach a verdict contrary to the evidence and/or instructions are not permitted).

In every state and federal Court, the Petitioner has argued that a hearing was necessary to develop a record in support of her claim that the lawyer's decision was not tactical or strategic.

Every Court has decided the ineffective lawyering claim on the cold record and has refused to give the Petitioner an opportunity to develop a record about the real reasons for the trial attorney's decisions.

For example, the district judge noted that the trial court had admitted statements made by the Petitioner that could be viewed as confessions. App. 6a The district judge stated that the "Petitioner's credibility was already seriously in question before her counsel embarked on the dual-defense tactic". App. 6a.

The district judge also agreed with the Michigan Court of Appeals that the "dual-defense tactic was not unreasonable given the unique set of circumstances present in the case...the two proffered defenses were not inconsistent with the evidence". App. 6a.

The district judge also concluded that the Petitioner was not prejudiced because the "jury had the opportunity to acquit the Petitioner in two ways, either by believing that she was innocent, or, if they chose not to believe her, to take the mental health testimony and all of the other evidence and find her legally insane". App. 6a.

The district judge stated that the jury could also have acquitted the Petitioner by concluding that the prosecution had not proven her guilt beyond a reasonable doubt. App. 6a.

Finally, the district judge cited this Court's decision in *Bell v. Cone*, 122 S.Ct. 1843, 1852 (2003) for the proposition that a

Petitioner must demonstrate that the state court applied *Strickland* in an objectively unreasonable manner. App. 6a, n. 1. The district judge concluded that the Petitioner had not carried this burden. *Id.*

All of these ultimate conclusions were speculations about why the trial attorney made decisions. Moreover, the Petitioner was simultaneously not given an opportunity to satisfy her burden and then denied relief because she did not meet that burden.

The Sixth Circuit Court of Appeals noted that the Petitioner was seeking an evidentiary hearing. App. 1a-2a. The Sixth Circuit cited a prior case for the proposition that an ineffective lawyering claim can be decided on the record "when the record is adequate to assess the merits of the defendant's allegations". App. 1a; *United States v. Hill*, 142 F.3d 305, 308 (6th Cir. 1998). App. 1a.

The Sixth Circuit then reasoned that, for the reasons stated by the district judge, the record was sufficient for the district judge to have made its decision. App. 2a. No hearing was required. App. 2a.

The Petitioner sought reconsideration or a rehearing en banc. That request was denied using standard language. App. 3a.

The decisions by the district judge and the Sixth Circuit Court of Appeals run counter to the reasoning used by this Court in *Massaro* and the reasoning used by a number of other Circuits as discussed *supra*.

Among other things, the Petitioner has faithfully followed the instructions of this Court and the Courts of Appeals by seeking a hearing to develop a record about her ineffective lawyering claims. The Petitioner has consistently maintained that a principled decision cannot be made about her attorney's reasons for choosing the dual defense without a hearing. The Petitioner has advanced a credible, non-strategic reason, for the trial attorney's decision: jury nullification. As set forth in more detail in the next section of this Petition, the Petitioner has pointed to specific instances of prejudice that followed from the trial attorney's decisions.

In addition, the Petitioner has argued that the refusal to allow a hearing rises to the level of a Fifth and Fourteenth Amendment violation in that the burden of proving ineffective lawyering was placed upon her. However, she was simultaneously denied a hearing which would allow her to prove her allegations. This combination has made the proceedings unfair because the decisions on the merits were based upon speculations rather than upon a fully developed record.

The Seventh Circuit case cited *supra*, *Brooks*, is also instructive. Specifically, it was the Seventh Circuit's position that a criminal defendant proceeded at his or her peril if that defendant raised ineffective lawyering arguments without the benefit of a hearing which developed a factual record about those arguments. The defendant could avoid that peril and related risk by eschewing review until after a hearing had been held.

In each federal and state Court, the Petitioner maintained that she was not seeking immediate rulings on her Petition. Rather, she was primarily seeking a hearing where an adequate record could be developed. Yet, each Court went directly to the merits and decided the issue on the existing record.

The Petitioner submits that these decisions create a conflict between the Sixth and Seventh Circuits and that this conflict is another reason to grant certiorari.

For all of these reasons, the Petitioner is respectfully asking this Court to grant certiorari for the purpose of resolving one of the issues left open in *Massaro* – the standards that should be used when deciding whether to allow a criminal defendant to develop a record about his or her ineffective lawyering claims and whether the criminal defendant's right to Due Process is violated when, in the absence of procedural default, the Petitioner is denied the opportunity to develop a record.

2. This cases presents issues similar to *Mathews v. United States*, 485 U.S. 48 (1988) albeit in a different context. This Court should grant certiorari to clarify that inconsistent defenses, while permissible in some contexts, can constitute ineffective lawyering and can warrant a decision to grant a habeas petition.

In *Mathews v. United States*, 458 U.S. 58 (1988), the defendant was an employee of a federal agency. He was convicted of accepting a bribe. The defendant was the subject of a sting operation where a customer of the agency offered the employee a personal loan in return for a favorable decision regarding the customer's application for a business loan. The defendant was arrested when he accepted the money from the customer and was thereafter prosecuted and convicted.

The defendant sought a jury instruction on entrapment. This jury instruction was sought despite the fact that the defendant's trial theory was that he had not committed any crime. The District Court and the Seventh Circuit Court of Appeals concluded that an entrapment instruction was not appropriate when a criminal defendant would not admit all of the elements of the underlying offense of accepting a bribe.

In this Court, the government argued that the instruction was not warranted because no rational jury could conclude that the defendant had both failed to commit the elements of the crime and had been entrapped.

This Court reversed. Among other things, this Court reasoned that federal and state cases have allowed inconsistent defenses. Examples were a rape case where the defenses were there was no rape and the victim consented and a homicide case where the defenses were accident and self defense.

This Court also concluded that while inconsistent defenses may increase the risk of perjury in some cases, the risks were less than suggested by the government.

For these reasons, this Court concluded that the entrapment instruction should have been given.

In *United States v. Hasting*, 461 U.S. 499 (1983), this Court addressed inconsistent defenses in the context of whether a prosecutor's impermissible reference to the defendants' failure to testify was harmless error. In *Hasting*, the defendants were convicted for kidnaping, transporting women across state lines for immoral purposes, and conspiracy to commit those offenses.

At trial, the defense relied on the theory of consent and alternatively mis-identification. These defenses were permitted and were in fact one of the reasons relied upon this Court to conclude that any error was harmless.

Whittaker v. United States, 281 F.2d 631 (D.C. Cir. 1960) analyzed defenses that were remarkably similar to the defenses raised by the Petitioner in the instant case. The defendant was charged with taking indecent liberties with a child and carnal knowledge.

At the opening of the trial, the defense informed the Court that the defenses would be "first, that no crime was committed by the defendant, and secondly, that, if the defendant did commit the crime, he was not guilty by reason of insanity". 281 F.2d at 269.

The trial court called defense counsel to the bench and told the defendant that he had to choose between the two defenses because they were inconsistent with each other.

On appeal, the D.C. Circuit held that there was no inconsistency between the two defenses because "they come to this, that the defendant did not to (sic) the acts charged, and that he would not be responsible for them if he did".

The D.C. Circuit also held that inconsistent defenses can be imposed in a criminal case, citing previous cases from its Circuit.

Because the defense was not allowed to present both defenses to the jury, it was not known what the evidence relating to the defenses might have been.

In *Turk v. White*, 116 F.3d 1264 (9th Cir. 1997), the two defenses were self-defense or insanity. The defendant argued that his counsel was ineffective for choosing one defense to the exclusion of the other. The Ninth Circuit disagreed and held that the use of both defenses would have confused the jury and undermined whatever chance the defendant had for acquittal. The Court specifically stated that the use of both defenses would have constituted ineffective lawyering.

A number of other Circuit Courts have concluded that the choice of one of two possible defenses does not constitute ineffective lawyering because such a choice avoids jury confusion and/or gives the defendant a reasonable defense given the facts of the defendant's case. *E.g., Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998); *Butcher v. Marques*, 758 F.2d 378 (9th Cir. 1985); *Jackson v. Shanks*, 143 F.3d 1313 (10th Cir. 1998); *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993).

As this Court noted in *Mathews*, pleading inconsistent defenses is well-recognized in civil practice, and the lack of a specific provision in the rules of criminal procedure did not prevent such defenses in a criminal case. *See, also, Little v. Texaco, Inc.*, 456 F.2d 219 (10th Cir. 1972) (discussing inconsistent defenses in the context of a civil action.

In sum, these precedents stand for the proposition that the decision by Petitioner's attorney to present inconsistent defenses was not precluded as a matter of law.

This Petition, however, asks this Court to consider the doctrine of inconsistent defenses in the context of ineffective lawyering and to conclude that there are circumstances, such as those present in the Petitioner's case, where the use of inconsistent defenses can amount to constitutionally ineffective lawyering.

The Petitioner respectfully asks this Court to consider the following factors, which the Petitioner believes makes her case unique:

A. The choice of defenses was made in a very unusual context. Specifically, the suppression hearing had given the trial attorney a detailed preview of the State's case. Indeed, the trial mirrored the evidence presented at the suppression hearing in all material respects;

B. The defense of legal insanity is very difficult to prove in Michigan. MCL 768.21a;

C. In Michigan, the defense of legal insanity is an affirmative defense which requires proof that as a result of mental illness or being mentally retarded, the defendant lacks the substantial capacity to either appreciate the nature, quality or wrongfulness of his or her acts or is unable to conform his or her acts to law. *E.g., People v. Carpenter*, 464 Mich 223, 627 N.W.2d 276 (2001); *People v. Toma*, 462 Mich 281, 613 N.W.2d 694 (2000). The defendant has the burden of proof by a preponderance of the evidence. MCL 768.21a. A defendant who is found not guilty by reason of insanity will receive the same sentence that would have been imposed if the defendant had been found guilty, except that the defendant is eligible for treatment while confined. MCL 768.36(3);

D. In other words, the insanity defense, even if successful, does not avoid confinement. By contrast, an innocence defense, if successful, would result in an acquittal and freedom;

E. The record showed that the Petitioner testified and denied that she had killed her daughter-in law;

F. The defense expert based his opinions on the fact that the Petitioner had a history of blackouts. The defense expert, however, was never told that the Petitioner had first claimed that she had been knocked out and that the Petitioner had changed her story to a blackout only after the police could not discover any evidence to support the knocked-out version.

The blackout theory also was significantly discredited during cross-examination when the expert could not explain how an unconscious woman could have found where her daughter-in-law was sleeping and fatally shot her in the head;

G. For these reasons, the defense expert's testimony had doubtful validity, and it is the Petitioner's position that the testimony did not, as a matter of law, establish that she was insane. In this regard, the prosecution presented contrary expert testimony that the Petitioner was not insane;

H. The use of the insanity defense created a number of problems for the defense;

I. Among other things, a witness testified that the Petitioner had told her, shortly before the killing, that she could solve her daughter-in-law problem by killing her and claiming insanity. This testimony has enormous impact *vis a vis* an insanity defense because the jury would have reason to believe that the insanity defense was fabricated in accordance with the plan recently revealed to a neighbor;

J. By contrast, the testimony would have had little impact upon an innocence defense because such a defense would not involve the Petitioner claiming insanity;

K. Because the Petitioner was testifying and was denying guilt, the insanity defense put the defense attorney in the posture of calling his client a liar because she had committed the crime. In this regard, the Petitioner did not testify that she couldn't recall committing the crime or otherwise present testimony which, if believed, would have supported the insanity defense;

L. The presentation of the insanity defense also allowed the State to admit evidence regarding admissions allegedly made to clinicians during her pre-trial insanity examination. The trial judge had ruled that the evidence would not be admitted if the defense was innocence. Thus, the use of both defenses allowed this additional and damaging evidence to be presented;

M. The Petitioner had a long history of mental difficulties and was taking a number of different medications both before and at the time of the killing. This evidence, however, was admissible even if only an innocence defense had been adopted. There was nothing in

this evidence that supported the claim that the Petitioner was legally insane;

N. The biggest hurdle to the innocence defense, as recognized by the District Judge, were the alleged admissions which the Petitioner had made to various individuals. However, these admissions could be explained by the Petitioner's mental difficulties and by the ambiguity of several of these admissions. If an innocence defense had been presented, one of the strongest groups of admissions-admissions made to clinicians-would not have been heard by the jury;

O. The innocence defense would have been bolstered not only by the Petitioner's testimony, but by the lack of direct evidence, including the absence of a weapon and negative paraffin tests. The Petitioner had no prior criminal record and was not the only person who had a motive. Among other things, there was evidence that the Petitioner's husband harbored strong and hostile feelings toward his daughter-in-law, that the husband had been in the military and was an expert in weaponry, that the husband had the opportunity to have been at the residence at the time of the killing, and that the husband moved his former wife into the family home shortly after the Petitioner's arrest.

Thus, while the admissions were a hurdle, they were not necessarily an insurmountable hurdle;

P. It has always been the Petitioner's position that the presentation of both defenses destroyed, short of jury nullification, any chance that the Petitioner had to prevail with the jury. This position is consistent with cases such as *Turk*, that have recognized the risks of jury confusion and a defense position that is beyond belief;

Q. The insanity defense had no legal chance of success because, in the end, the defense expert's testimony did not establish legal insanity and was undercut by contrary expert testimony and weaknesses in the expert's analysis; and

R. In sum, the presentation of both defenses gave the defense its worst possible scenario by completely undercutting the

Petitioner's own testimony with evidence that did not, as a matter of law, establish the insanity defense.

The District Judge and the Sixth Circuit rejected any claim of ineffective lawyering without a hearing.

The Petitioner submits that manifest injustice occurred, both because a hearing was not held and because the reasoning given to find effective lawyering was inconsistent with this Court's jurisprudence.

The District Court and the Sixth Circuit pointed to the admissions that the Petitioner had made as a reason to explain why the dual-defenses were chosen. App. 2a and 6a.

While the Petitioner acknowledges that her alleged admissions were her greatest trial problem, the Petitioner has also argued that the alleged admissions did not doom the innocence defense. Moreover, since the insanity defense presented was insufficient as a matter of law, its use would never have assisted the Petitioner.

The District Judge and the Sixth Circuit ruled that the two defenses were not inconsistent with the evidence. App. 2a and 6a.

However, that ruling ignores the fact that the insanity defense was inadequate as a matter of law. That argument also seems based on the assumption that it is always effective lawyering to present defenses which are supported by the record.

In addition, there is nothing in *Mathews*, for example, that supports the conclusion that the legal authority to present inconsistent defenses is always effective lawyering. It is the Petitioner's position that the unique facts of this case, particularly if expanded by a hearing, would establish that ineffective lawyering in fact occurred in the Petitioner's case.

The District Court and the Sixth Circuit reasoned that there was no prejudice because the jury had two theories which, if believed, would have supported an acquittal. App. 2a and 6a. The lower

courts also reasoned that the jury could have acquitted the Petitioner by concluding that her guilt had not been proven beyond a reasonable doubt. App. 2a and 6a.

The Petitioner submits that these reasons ignore the fact that the insanity defense was insufficient as a matter of law and the further fact that this legally insufficient defense both undercut the innocence defense and offered no prospect of success, other than through the forbidden doctrine of jury nullification.

In sum, the jurisprudence of this Court and the Courts of Appeal do not stand for the proposition that the use of inconsistent defenses is always effective lawyering. The Petitioner is respectfully asking this Court to grant certiorari so that the interplay between inconsistent defenses and ineffective assistance of counsel can be explored and defined.

Alternatively, the Petitioner asks this Court to consider the arguments made in this section of the Petition in tandem with the first issue and to conclude that these arguments and the prejudice that could be proven at a hearing support the decision to grant certiorari at least as to the hearing issue.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari as to one or both of the issues presented.

Respectfully submitted,

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APPENDIX A

No. 02-2091

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NANCY LOUISE ABERNATHY,
Petitioner-Appellant,

v.

JOAN YUKINS, WARDEN,
Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: SUHRHEINRICH, BATCHELDER, and COLE, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Nancy Louise Abernathy ("Abernathy") appeals the district court's denial of her petition for habeas review. Specifically, Abernathy alleges that the district court unreasonably applied *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984), in finding that her trial attorney was not constitutionally ineffective for asserting simultaneous defenses of innocence and insanity to the charge that she murdered her daughter-in-law. Additionally, Abernathy argues that because the district court denies Abernathy's request to hold an evidentiary hearing, the record is insufficient for this Court to determine whether the district court unreasonably applies *Strickland.*

A court may decide an ineffective assistance of counsel claim on the trial record "when the record is adequate to assess the merits of the defendant's allegations." *United States v. Hill,* 142 F. 3d

305, 308 (6th Cir. 1998). We find that the district court did not err in ruling on the habeas petition without holding an evidentiary hearing because the record was sufficiently developed, as reflected in the district court's opinion. After carefully reviewing the record, the applicable law, the parties' briefs, and counsels' arguments, we are convinced that the district court did not err in its conclusions. As the district court's opinion, which incorporates the Magistrate judge's report and recommendation, carefully and correctly sets out the law governing the issues raised, and clearly articulates the reasons underlying its decision, issuance of a full written opinion by this court would serve no useful purpose. Accordingly, for the reasons stated in the district court's opinion, we AFFIRM.

APPENDIX B

No. 02-2091
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

NANCY LOUISE ABERNATHY,
Petitioner-Appellant,

v.

JOAN YUKINS, WARDEN,
Respondent-Appellee

BEFORE: SUHRHEINRICH, BATCHELDER, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NANCY LOUISE ABERNATHY,
Petitioner-Appellant,

v.

JOAN YUKINS, WARDEN,
Respondent-Appellee
_____/

Case No. 1:01-CV-44
HON. GORDON J. QUIST

ORDER ADOPTING REPORT AND RECOMMENDATION

The court has before it Petitioner's Objection to the Magistrate Judge's Report and Recommendation issued on July 29, 2002, in which the Magistrate Judge recommended that Petitioner's habeas corpus petition be denied. After conducting a de novo review of the Report and Recommendation, the Court concludes that the Report and Recommendation should be adopted by the Court.

The facts are set forth in the Report and Recommendation, and Petitioner makes no objection to the recitation of facts by the Magistrate Judge. In addition, Petitioner conceded that the standard of review utilized by the Magistrate Judge, 28 U.S.C. § 2254, was correct. However, Petitioner argues that the Magistrate Judge erred in his legal analysis.

I. Ineffective Assistance of Counsel

In her petition, Petitioner argued that her trial counsel was so ineffective as to violate her Sixth Amendment right to counsel. In the Report and Recommendation, the Magistrate Judge correctly noted that such an argument is decided by the application of the two-prong test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). As held in Strickland:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. At 687, 104 S.Ct. at 2064

The Magistrate Judge found that trial counsel's tactic of presenting simultaneous defenses of innocence and insanity to the charge that Petitioner murdered her daughter-in-law was not outside the range of professionally competent assistance. Having made that finding, the Magistrate Judge did not proceed to the second prong of the Strickland test.

Petitioner objects, asserting that the two defenses put forth by her trial counsel made her appear not credible to the jury when testifying as to her innocence. In addition, Petitioner argues that trial counsel's decision to introduce evidence as to Petitioner's mental health permitted the prosecution to elicit damaging testimony from mental health professionals as to Petitioner's admission of guilt during treatment.

As set forth in Strickland, a reviewing "court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. At 690, 104 S.Ct. at 2066. Counsel is not required to be perfect, but rather, "capable of advancing his client's interest." McQueen v. Scroggy, 99 F.3d 1302, 1318 (6th Cir. 1996).

Given the fact that the trial court admitted statements made by Petitioner herself in which she confessed to the murder, Petitioner's credibility was already seriously in question before her counsel embarked on the dual-defense tactic. In addition, as found by the trial court (in ruling on a motion for a new trial), the Michigan Court of Appeals, and the Magistrate Judge, the dual-defense tactic was not unreasonable given the unique set of circumstances present in the case. On other words, in light of the circumstances present during trial, the two proffered defenses were not inconsistent with the evidence.

Even if trial counsel had performed deficiently in violation of the first prong of the Strickland test, the Court does not find that the presentation of the two defenses was "so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. The jury had an opportunity to acquit Petitioner in two ways, either by believing that she was innocent, or, if they chose not to believe her, to take the mental health testimony and all of the other evidence and find her legally insane. In fact, a reasonable jury could have viewed the petitioner's inconsistent statements as further evidence of her mental illness. Finally, the jury could have rejected both of those options, and found Petitioner not guilty because the prosecution had not proven her Guilt beyond a reasonable doubt.[1]

Therefore, Petitioner's objections to the Report and Recommendation based upon the ineffective assistance of counsel argument are denied.

II. Fifth Amendment Violations

Petitioner's second argument is that certain statements were obtained from her in violation of her Fifth Amendment rights, including but not limited to the protections afforded in Miranda v.

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[1]In addition, the recent holding of the United States Supreme Court in Bell v. Cone, 122 S.Ct. 1843, 1852 (2002), applies here: "For respondent to succeed, however, he must do more than show he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner. This, we conclude, he cannot do." For the reasons stated in this Order, the same is true in the present case.

Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). The trial court rules that the various statements were admissible, and the Magistrate Judge found no violation of Petitioner's Fifth Amendment rights.

A. Statements Made at Petitioner's Home

Petitioner telephoned 911 to report the death of her daughter-in-law, and made several statements to the police after they arrived at her home. Petitioner asserts that since she was not provided with Miranda warnings before making those statements, the statements should not have been admitted at trial. The Magistrate Judge found no custodial interrogation by the police at Petitioner's home, and thus, no violation of Petitioner's rights in this regard.

First, it is clear that Miranda governs "the admissibility of statements made during custodial interrogation in both state and federal courts." *Dickinson v. United States*, 530 U.S. 428, 432, 120 S.Ct. 2326, 2329-30 (2000). As stated in Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528 (1994), "[a]n officer's obligation to administer *Miranda* warnings attaches, however, 'only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (quoting Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714 (1977). The Court went on to hold that when "determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Stansbury at 322. (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 (1983). The court must look at the custody issue from an objective standpoint; in other words, what would a reasonable person in defendant's shoes have believed at the time? Stansbury at 323-324. If an officer make a statement or gestures to a defendant, and defendant asserts that such statements or gestures indicated custody, that too must be looked at with an objective eye. Id. At 325. So, in the present case, would a reasonable person in Petitioner's position have believed she was in custody?

In addition, if Petitioner volunteers information on her own, without police interrogation, no violation occurred. "It has been settled that volunteers statement made by a suspect, not in response to interrogation, is not barred by the Fifth Amendment and is admissible with or without the giving of *Miranda* warnings." United States v. Thornton, 17 F.Supp.2d 686, 693 (E.D.Mich. 1998)

Petitioner asserts three specific incidents to demonstrate that she was in custody: 1) when she moved from the kitchen area into another part of the home, she was accompanied by an officer; 2) when she went to change clothes so that the police could take her clothes as evidence, she was accompanied by an officer, and 3) when her husband arrived on the scene, he was not permitted to enter the home. First and foremost, the Petitioner's home was a crime scene. In the interest of an untainted investigation, the police acted properly in accompanying Petitioner as she journeyed through the house to ensure that no evidence was disturbed. In addition, since her clothes were desired as evidence, an officer should have accompanied her to preserve the chain of evidence. Finally, the police acted properly in preventing Petitioner's husband, or any other non-official person, from entering the home while the scene was still under investigation. None of these instances is tantamount to custody (i.e., a reasonable person would have felt he was not free to leave), and as the Magistrate Judge found, Petitioner was not deprived of her freedom in any significant way.

B. Statements Made at Police Station

At some point after arriving at Petitioner's home, the police requested that Petitioner accompany them to the police station, and she agreed. She was not placed under arrest, but when she arrived at the station, Petitioner was advised of her Miranda rights. Petitioner waived those rights and furnished additional information to the police. At the conclusion of the interview, no charges were filed, and Petitioner was free to leave the station, which she did. Petitioner now asserts that while she did waive her Miranda rights, the statements were not truly voluntary because she was in a dominating environment.

The mere fact that Petitioner was in the police station does not vitiate the voluntariness of her statements. Once she validly waived he Miranda rights, the police were not obligated to take her to another location to interrogate her. There is also nothing in the record to suggest that her statements are unreliable. The Magistrate Judge was correct in denying the petition on this ground.

C. Statements Made to Bier and Logins

While being transported to the Forensic Center for competency test, Petitioner told fellow transportee, C.C. Logins, that she in fact had killed her daughter-in-law. This statement was also overheard

by another transportee, Tonya Bier. The confession was reported to the officer driving the van, who in turn relayed the confession to the police investigating the murder. Subsequently, the confession was admitted at Petitioner's trial.

The Magistrate Judge was correct in finding that there was no state action or other government involvement in the elicitation of the confession when Logins engaged Petitioner in conversation. The motivation of Logins in engaging Petitioner in conversation is irrelevant if the government did not engage Logins to elicit the confession in the first place. Petitioner is only speculating that some covert plan was in place to elicit the confession, and absent any evidence to support such speculation, the Magistrate Judge was correct that Petitioner's Fifth Amendment rights were not violated.

III. Statements Made to Lisa Carpenter

Approximately three years prior to the murder of Petitioner's daughter-in-law, in a conversation with Lisa Carpenter, Petitioner complained about her daughter-in-law and stated that she would kill her given the chance. Ms. Carpenter testified to this statement during Petitioner's trial, with the trial court ruling it admissible as it showed intent and a plan. Petitioner asserts that the statement should have been excluded because it was more prejudicial than probative.

The Court agreed with the Magistrate Judge that the admission of the statement did not deny Petitioner a fundamentally fair trial. Certainly, the statement was prejudicial to Petitioner, but a reasonable judge could find that its probative value outweighed that prejudice. The statement went directly to Petitioner's intent, and was consistent with subsequent statements made by Petitioner to Logins and mental health professionals that she in fact had killed her daughter-in-law.

Therefore,

IT IS HEREBY ORDERED that Magistrate Judge's Report and Recommendation issued July 29, 2002 (docket no. 45) is **APPROVED AND ADOPTED** as the Opinion of this Court, and the decision denying Petitioner's habeas corpus petition (docket no.1) be **AFFIRMED.**

Dated: August 20, 2002

Gordon J. Quist
UNITED STATES DISTRICT JUDGE

APPENDIX D

No. 02-2091
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

NANCY LOUISE ABERNATHY,
Petitioner-Appellant,

v.

JOAN YUKINS, WARDEN,
Respondent-Appellee

Nancy Louise Abernathy, a Michigan prisoner represented by counsel, appeals the district court order dismissing her petition for a writ of habeas corpus. See 28 U.S.C. § 2254. She has applied for a certificate of appealability. See Fed. R. App.P. 22(b)(1).

Upon, Review, a certificate of appealability is granted with respect to the following claim: whether Abernathy's attorney's decision to present two defenses constituted ineffective assistance of counsel. The application is denied as to all other claims. The clerk is directed to establish a briefing schedule.

ENTERED BY ORDER OF THE COURT

Clerk

APPENDIX E

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

AMENDMENT 6

Rights of the accused.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX G

AMENDMENT 14

Section 1. Citizens of the United States.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.